IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.472 OF 2003

...

Patel Engineering Ltd. ...Petitioner

v/s.

The Municipal Corporation

of Gr.Bombay ...Respondent

...

Mr.Janak Dwarkadas with Mr.T.N. Subramanium and Mr.D.J. Khambata i/b B. Munim & Co. for the Petitioner.

Mr.R.D. Dhanuka with Mr. J. Xavier for Respondent.

...

CORAM: D.K.DESHMUKH, J.

DATED: 21ST MARCH,2005

P.C.:

1. This petition is filed under Section 33 of the Arbitration Act, 1940 for a declaration that the arbitration agreement between the parties contained in clause 97 of the General Conditions of the Contract has come to an end and/or has exhausted itself and now there is no Arbitration Agreement in existence between the parties.

2. The facts that are material and relevant for deciding this petition are that the Petitioner is a Public Limited Company engaged in the business of construction and engineering. The Respondent/Bombay Municipal Corporation invited tenders in respect of construction of an underground tunnel for water supply to the Bombay city. The Petitioner submitted a tender for execution of the work of construction of underground tunnel between Dr.E. Moses Road and Ruparel College, Mumbai. The tender of the Petitioner was accepted. The General Conditions of Contract formed a part of the contract awarded to the Petitioner. The work commenced in October, 1989.

The work could not be completed in time by the Petitioner, therefore, extension of time was sought. Despite extension the Petitioner could not complete the work. Ultimately by letter dated 7th August, 1992 the Respondent issued a notice to the Petitioner to proceed with the work of excavation of the tunnel using TBM with due diligence within 30 days from the receipt of the notice, and failing which it was stated that further action including cancellation of the W-20 contract would be taken. In these circumstances, Arbitration Suit No.2984 of 1992 was filed in this Court by the Petitioner in September, 1992 for taking the arbitration agreement on record and for reference of the disputes between the parties to the arbitrator. The Petitioner also filed Arbitration Petition No.151 of 1992 under Section 41(b) of the Arbitration Act, 1940 for an order of injunction restraining the Respondent from terminating the contract. By consent of parties, the arbitration suit was decided by order dated 16th October, 1992 and this Court referred all the claims and counter claims of the parties to the sole arbitrator Hon'ble Mr. Justice D.M. Rege (Retired). Accordingly the parties appeared before the learned arbitrator and filed their claims and counter claims.

In the counter claim that was filed by the Respondent, the Respondent stated that as per the terms of the contract because of the failure of the Petitioner to carry out the entire work, the Respondent/Corporation is entitled to complete the work at the risk and costs of the Petitioner. It was stated that the actual additional cost of executing the balance work under the contract cannot be estimated by them now and hence they reserved their right and sought liberty to omit to make any claim on that count herein and reserved their right to make fresh claim in respect of actual risk and cost of the Petitioner. It appears that the counter claim was filed by the Respondent on 15th March, 1993. The balance work was awarded to one Hindustan Construction Company Ltd. on 14th December, 1994. The arbitration proceedings continued between the parties. The learned Arbitrator made his award on 22nd April, 1997. The learned arbitrator awarded certain amounts to the claimant and the learned arbitrator also awarded certain amounts to the Respondent. None of the parties challenged the award. This award was fully implemented by the parties.

3. It appears that the Hindustan Construction Company to whom the incomplete work was awarded completed the work in the month of August, 2000. They submitted their final bill in the month of March, 2001. Thereafter the Respondent issued a notice to the Petitioner asking the Petitioner to pay the amount of damages in March, 2003 and stated that if the Petitioner does not pay the amount , they will invoke the arbitration clause 97 and refer the matter to arbitration. It is in these circumstances that the present petition has been filed under Section 33 of the Arbitration Act, 1940.

4. The learned Counsel appearing for the Petitioner submits that the cause of action for claiming damages on account of the work that remained incomplete arose in the year 1992, when the contract was terminated. When the counter claim was filed by the Respondent before the arbitrator, the Respondent had sought leave of the learned arbitrator to make a claim for damages because the amount of damages was not quantified at that time. In the award the learned arbitrator though referred to the statement in the reply of the Respondent that they are seeking leave of the arbitrator, he neither granted the leave nor

rejected the same. Therefore the only remedy available to the Respondent was to challenge the award on that ground, but the Respondent did not challenge the award and accepted the same. According to the learned Counsel for the Petitioner, therefore, in these circumstances invocation of the arbitration clause now for claiming damages is barred by principle analogous to Order 2 Rule 2 of CPC.

5. The learned Counsel further submits that the cause of action for claiming damages arose in the year 1992 when the contract was terminated. According to the learned Counsel, in any case when the Respondent awarded the contract to Hindustan Construction Company in December, 1994, they knew what was the amount of damages, therefore, they could have added their claim by amending their reply filed before the arbitrator. But the Respondent did nothing. According to the learned Counsel, therefore, even if it is assumed that the leave of the arbitrator sought by the Respondent was granted by the arbitrator, then also the claim for damages had to be made within a period of three years from the date of accrual of the cause of action. Admittedly, no such claim has been made within a

period of three years from the date of accrual of the cause of action. Therefore, the claim is also barred by the law of limitation. The learned Counsel for the Petitioner submits that even the claim of the Respondent that invocation of the arbitration clause would be governed by the provisions of new Act and not the old Act is not proper because the cause of action for claiming damages arose in the year 1992 when the contract was terminated and not when the amount of damages got crystalised. In 1992 when the cause of action arose it was the old Act, which was in force and therefore the new Act would not apply.

6. The learned Counsel appearing for the Respondent, on the other hand, submits that this petition under Section 33 is not maintainable because the disputes arising even after the termination of the contract can be referred to the arbitration and therefore it cannot be said that because the contract is over the arbitration clause ceased to operate. The learned Counsel submits that on the principle analogous to Order 2 Rule 2 of CPC the leave of the arbitrator was sought, though the arbitrator has referred to it in his award the arbitrator has not refused to grant the leave. Therefore, the leave is presumed to have been

granted in favour of the Respondent. It is further claimed that the limitation starts from the date on which the amount of damages were crystalised and according to the learned Counsel that crystallisation has taken place in March, 2003 when the demand was made and payment was not made. The learned Counsel submits that the present petition under Section 33 is not maintainable because invocation of the arbitration clause is now under the new Act and not under the old Act.

7. Now, in the light of these rival submissions it becomes necessary first to refer to clause 97 of the General Conditions of Contract. It reads as under:

> **ARBITRATION**
>
> 97. All disputes or differences whatsoever which shall at any time arise between the parties hereto touching or concerning the works or the execution or maintenance thereof or this contract or the construction, execution, or maintenance thereof or this contract or the

> construction meaning operation or effect thereof or, to the rights or liabilities of the parties or arising out of or in relation thereto whether during or after completion of the contract or whether before or after termination, foreclosure or breach of the contract (other than those in respect of which, the decision of any person is by the contract expressed to be final and binding) shall after written notice by either party to the contract to the other of them specify the nature of such dispute or difference and call for the point or points at issue to be referred to the arbitration.

8. Perusal of the above clause shows that the dispute arising between the parties in relation to the contract or under the contract either before or after the termination of the contract would be arbitrable. There is no dispute before me that what is being claimed by the Respondent now is the damages. The right of the Respondent to claim damages arises because of the conduct of the

Petitioner of not completing the contract. Therefore, the right of the Respondent to recover damages will arise on the date of termination of the contract. The termination took place in 1992. From the pleading of the Respondent, in their reply filed before the arbitrator on 15th March, 1993 it is clear that this position was understood by the Respondent also. Following from the reply of the Respondent is relevant for appreciating this aspect of the matter:(Paragraphs 24, 26 and 27 of the reply and paragraph 6 of the counter claim)

> 24. ..... In fact it is the respondents who are entitled to carry out the balance work at the risk and cost of the claimants and also claim damages and the losses suffered by the respondents, as partly done in the Counter Claim hereto, whilst reserving their right to claim the additional cost which may be incurred in the execution of the balance work under Contract W-20.
>
> 26. With reference to paragraph 39.0 the

respondents repeat that the entire advances paid to the claimants have not been fully adjusted and/or appropriated and/or cannot be so adjusted or appropriated towards the claims contained in Ex.V and put the claimants to the strict proof of the said contention. Since the respondents were constrained to cancell the contract on account of the actions of the claimants and their continued non performance of the contract. The respondents submit that they are entitled not only to encash Bank Guarantees but also to recover additional cost of carrying out the balance work and recovering other amounts as per condition No.90 of the GCC and for which they reserve their rights herein. The respondents submit that the claimants have made out no case in support of the claim that the Bank Guarantees stand discharged and/or are of no effect and/or for a direction for their returned dully cancelled or otherwise and put the claimants to the strict proof of the said contention.

27. With reference to paragraph 40.0 the respondents deny that they are entitled to any of the reliefs claimed in clauses (a) to (e) thereof. The respondents say and submit that it is they who are presently entitled to claim and are claiming by way of counter claim a sum of Rs.1250.37 lakhs as more particularly set out in the counter claim hereafter. The respondents submit that nothing is due or payable by them to the claimants.

(Paragraph 6 of the counter-claim)

6. Accordingly the respondents submit that in so far as the actual additional cost of executing the balance work under contract W-20 is concerned, the same cannot be estimated by them now and hence they reserve their right and seek liberty to omit to make any claim on that count herein and to make a fresh claim in respect thereof at a later date/appropriate time. As regards the claims included in Ex.RC-1 hereto, the same are for &/or on the basis

> of costs actually incurred &/or on the basis of drawings & rates presently in existence/force for work to be done on the said incomplete works.

9. In paragraph 26 quoted above the Respondent in terms has stated that because of the inability of the Petitioner to complete the work in time, the Respondent was entitled to terminate the contract and because the Respondent was justified in terminating the contract, it became entitled to recover costs of carrying out the balance work and recovering the other amount under Clause 90 of the General Conditions of Contract from the Petitioner. It is thus clear that even according to the Respondent, their cause of action for recovering damages arose from the date of the termination of the contract in the year 1992. There is no dispute before me that principles analogous to the provisions of Order 2 Rule 2 of CPC are applicable and therefore without seeking leave of the arbitral tribunal the Respondent could not have omitted to claim the amount of damages and hence the Respondent sought leave of the arbitrator to omit to claim the

amount of damages. The learned arbitrator in his award has also referred to this aspect of the matter. The learned arbitrator in the award has noted the claim made by the Respondent thus:

> While reserving a right to claim general damages, they have asked for an award of Rs.1250.37 lacs on other items as per particulars in Ex.RC1 to the counter-claim.

10. Thus, it is clear that while proceedings were pending before the learned Arbitrator, the cause of action to the Respondent to claim damages had arisen and they had sought leave of the learned arbitrator to claim those damages separately. It therefore follows that in order to enable the Respondent to make a claim for damages separately, leave of the learned Arbitrator was necessary. Perusal of the award made by the learned arbitrator shows that the learned arbitrator though has referred to this request made on behalf of the Respondent has not considered this aspect of the matter and has not granted leave to the Respondent which was sought by

the Respondent. Omission of the learned arbitrator to consider this question and to refuse to grant leave will not result in grant of leave by the learned arbitrator. The position would be that though the Respondent sought leave of the learned arbitrator to claim damages separately the learned arbitrator did not grant that leave, though the leave was not refused. The remedy of the Respondent, therefore, was to challenge the award on that ground and secure the leave. But the Respondent/Corporation admittedly accepted the award. Therefore, the position that was arrived at between the parties, was that though the leave of the learned arbitrator according to the Respondent/corporation was necessary for institution of its claim for damages separately and though that leave was sought, it was not granted by the arbitrator. Therefore, the right of the Respondent to institute a separate claim for damages would be barred and therefore petition under Section 33 for claiming such declaration would be maintainable.

11. It is further to be seen here that it is clear that the cause of action had accrued in 1992 itself, it is clear that the contract was awarded to

Hindustan Construction Company in 1994 during the pendency of the arbitration proceedings and therefore the Corporation knew the amount of loss suffered by it. In any case, even assuming that the exact amount of loss was not known to the Corporation, in terms of provisions of Section 74 of the Contract Act in such a situation the Respondent/corporation was entitled to claim reasonable compensation and it could have led evidence to prove what was the amount of reasonable compensation. When the Respondent applied for leave to omit the claim for damages, it conceded that the cause of action for institution of proceedings for recovery of damages has already accrued to them. The application for leave was contained in the counter claim submitted by the Respondent on 15th March, 1993. It is thus obvious that the cause of action for claiming damages accrued to the Respondent before March, 1993. Therefore, the period of limitation will start running from 1992. Because the Respondent had applied for leave , the period of limitation will not stop running. In this situation, the Respondent should have either included their claim for damages in the counter claim by amending the counter claim or should have

secured leave and instituted separate proceedings for recovery of damages. But either steps had to be taken within a period of three years (which is the period of limitation laid down by the Limitation Act for institution of proceedings for recovery of damages) from the date of accrual of the cause of action. As the cause of action for claiming damages had accrued before 15th March, 1993, even assuming that the amount of damages was not crystalised by then, still the claim will have to be made within a period of three years. In that event the Respondent could have claimed reasonable compensation because the actual amount of damages cannot be computed as provided by Section 74 of the Contract Act.

12. It is further to be seen here that even assuming that the cause of action accured to the Respondent for claiming damages when the amount of damages got crystalised, then also the cause of action will arise on crystallisation of the claim on 31-3-2001 and therefore the arbitration clause will have to be invoked within three years thereafter. Arbitration clause, admittedly, has not been invoked till this date. Even if one considers the interim order made in this petition and the period during

which that interim order was operating is to be excluded, then also the period from 5th April, 2003 to 9-12-2003 would liable to be excluded. Looking from this point of view also now the period of limitation has expired for making the reference.

13. It is submitted on behalf of the Respondent that because the 1940 Act has been repealed, this application under Section 33 of the 1940 Act is not maintainable. the submission is not well founded. Section 85(2) of the 1996 Act provides that despite repeal of the 1940 Act, that Act will continue to apply the proceedings commenced before the repeal of that Act. In the present case the arbitration proceedings commenced in 1993 and the question that is raised in these proceedings is whether because of the arbitration proceedings that commenced in 1993, the arbitration clause is exhausted or not. This question will have to be decided with reference to the proceedings that were commenced in 1993. Therefore, in my opinion, the present Petition is maintainable.

14. Looking to the matter from any point of view invocation of the arbitration clause at this

juncture for claiming damages would be an exercise in futility and waste of public funds by the Respondent, which is a local authority.

15. Taking overall view of the matter, therefore, present petition deserves to be allowed. It is accordingly granted in terms of prayer clause (a). The Respondent is directed to pay cost of this petition to the Petitioner, as incurred by the Petitioner.

...